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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re The Mercy Hospital of Pittsburgh

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Serial No. 75/767,435

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Michael D. Lazzara of Kirkpatrick & Lockhart LLP for The Mercy Hospital of Pittsburgh.

Lynn A. Luthey, Trademark Examining Attorney, Law Office 102 (Thomas Shaw, Managing Attorney).

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Before Simms, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

The Mercy Hospital of Pittsburgh (a nonprofit Pennsylvania corporation) has filed an application to register on the Principal Register the mark OPERATION SAFETY NET for services identified as amended to "healthcare services provided to unsheltered and transient homeless community through drop-in care centers, shelters, mobile care van and by foot and other related medical treatments, said healthcare services not including drug replacement treatment services" in International Class 42.

The application was filed on August 4, 1999, and is based on applicant's claimed dates of first use and first use in commerce of May 31, 1992 and June 19, 1993, respectively. In response to the requirement of the Examining Attorney[1], applicant disclaimed the words "safety net."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its identified services, so resembles the registered mark SAFETY NET for "health care services, namely drug replacement treatment services for qualified needy patients" in International Class 42,[2] as to be likely to cause confusion, mistake or deception.

Applicant has appealed, and briefs have been filed. An oral hearing was held before this Board on January 16, 2002.

Upon consideration of the pertinent factors set forth by the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), for determining whether a likelihood of confusion exists, we find that confusion is not likely.

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[1] The Examining Attorney stated that "the wording [safety net] is merely descriptive of the healthcare services." (First Office action, p. 2)

The Examining Attorney contends that the marks SAFETY NET and OPERATION SAFETY NET are similar in sound and appearance; that the addition of the word OPERATION to the registered mark does not create a different commercial impression, as "operation" can refer to a medical procedure thereby reinforcing the healthcare/medical commercial impression; that the respective services "are identical, namely the provision of healthcare services" (brief, p. 6); that both applicant's and registrant's services are rendered to needy or homeless people; and that overall, the consumer seeking healthcare and medical services could be confused as to the source of the services.

Applicant argues that the marks, when considered in their entireties and without dissecting applicant's mark, are dissimilar in sound, appearance, connotation and overall commercial impression; that the cited registered mark is passive while applicant's mark connotes a "broad range of services provided with the zeal of a purposeful campaign" (brief, p. 7); and that the respective services are different as identified (and in the marketplace), with applicant providing health care to the homeless and registrant providing different drug replacement services to

[2] Registration No. 1,757,369, issued March 9, 1993, to Amgen Inc., Section 8 affidavit accepted, Section 15 affidavit

qualified needy patients, particularly as applicant's identification of services *specifically excludes* drug replacement treatment services. Further, applicant argues that the trade channels (the delivery of the respective services) and consumers are different, specifically contending that applicant provides its services by approaching the homeless at locations where homeless people actually live (e.g., under bridges, in tunnels, city sidewalks, etc.), whereas registrant provides replacement drugs to qualified patients who have been sponsored by a physician, hospital, home health company or retail pharmacy; and that the physicians and medical entities that sponsor patients for registrant's drug replacement services, as well as the medical personnel providing applicant's medical care and counseling to the homeless are sophisticated and knowledgeable and all will understand the difference between providing a broad range of medical care to the homeless and applying to registrant corporation for replacement drugs made by registrant.

Turning first to the marks, SAFETY NET and OPERATION SAFETY NET obviously share the common words SAFETY NET. However, it cannot be said that the registered mark SAFETY NET is arbitrary in the context of the involved services.

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acknowledged.

Rather, SAFETY NET is at least highly suggestive of healthcare services in the sense that it connotes something that provides a margin of protection or security, especially to those who are not covered by insurance and/or who cannot otherwise obtain healthcare services. The Examining Attorney considers the term SAFETY NET to be merely descriptive of applicant's healthcare services and required a disclaimer from applicant. Thus, the scope of protection of such marks is not broad. As the Court of Customs and Patent Appeals stated in *Sure-Fit Products Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958): "Where a party chooses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of what we have said is that in the former case there is not the possibility of confusion that exists in the latter case." See also, *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §11:73 (4th ed. 2000).

Moreover, the prominent, first word in applicant's mark, OPERATION, adds an element that creates a new and different connotation, as well as a separate commercial impression from that created by the words SAFETY NET alone.

See *Colgate-Palmolive Company v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529 (CCPA 1970); and *In re Denisi*, 225 USPQ 624 (TTAB 1985). While the word OPERATION might be perceived as a medical/surgical procedure as argued by the Examining Attorney, we find it more plausible that purchasers and users of these services would perceive the term "operation" more in the context of an overall campaign or a dynamic project to aid those least able and least likely to obtain medical services. This is especially true when applicant's mark is viewed in its entirety: OPERATION SAFETY NET.

Turning next to a consideration of the respective services, it is well settled that the Board must determine the issue of likelihood of confusion on the basis of the goods and/or services as identified in the application and the registration. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). While applicant's and registrant's services are both in the broad, general field of healthcare services, they are not identical services. Thus, the factual issue before the Board is whether this record establishes a *prima*

facie case that the services are commercially related, and we find that it does not. Applicant submitted into the record printouts of a few pages from registrant's Web site with regard to its SAFETY NET program, printouts from applicant's own Web site, and a brochure on applicant's services offered under the mark OPERATION SAFETY NET. It is clear from these materials that the services, as identified, are distinct and unrelated health care services. Applicant provides for homeless and transient people a wide range of general physical and mental healthcare, *specifically excluding* drug replacement services. By contrast, registrant ensures that medically indigent (uninsured or underinsured with limited or no financial resources) people ("qualified needy") can obtain a "replacement" drug for some of registrant's own drugs (e.g., one for dialysis treatment and one for treatment of Hepatitis C) by providing these replacement drugs, but only for enrolled "patients."

Accordingly, we find that applicant's services are significantly different from registrant's services, and that there is no evidence in the record that these services overlap. The services are different in the manner in which they are obtained by the ultimate user, and different in function. Applicant provides medical care directly to the

homeless/transient population on the street, while registrant provides a very specific drug replacement program for a few of registrant's own branded, pharmaceutical products to persons who are properly enrolled in registrant's program. The fact that both parties are involved in the healthcare field does not mandate a finding that the services are related or that confusion is likely. See *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786, 791 (1st Cir. 1983); and *The Trustees of Columbia University in the City of New York v. Columbia/HCA Healthcare Corporation*, 964 F. Supp. 733, 43 USPQ2d 1083 (SDNY 1997).

The ultimate consumers may overlap, in that the "qualified needy patients" as identified in registrant's registration could conceivably include the "homeless" people identified in applicant's application. Nonetheless, we find that these services are not significantly commercially related – based upon differences in the way the services are identified in the application and registration, and buttressed by information from the Internet evidence of record. Specifically, we note that applicant's services are "healthcare services provided to unsheltered and transient homeless community through drop-

in care centers, shelters, mobile care van and by foot and other related medical treatments, said healthcare services not including drug replacement treatment services," making it clear that these are general mental and physical healthcare or medical services for homeless/transient people on the streets, and that applicant actively visits the areas where homeless/transients are ("mobile care van, and by foot"). The Internet evidence shows that applicant's healthcare services are provided by volunteers -- medical students and residents. Whereas, registrant's services are "health care services, namely drug *replacement* treatment services for *qualified needy patients*," (italics emphasis added), making it clear that these are replacement drugs provided directly by registrant, and they are provided only to patients who are signed up for and qualify for registrant's drug replacement program. That is, the identification of services in the cited registration specifies that some professional person must determine that the "patient" is "qualified" for participation in registrant's "drug replacement" program. The actual purchasers of registrant's services are doctors or other medical professionals who recommend a qualified patient for the registrant's drug replacement treatment, as compared to the delivery of applicant's services by medical

professionals associated with applicant hospital. Doctors and other medical professionals are generally a very sophisticated group of consumers who use great care in deciding how to treat their patients.

On this record, we do not find a sufficient commercial relationship exists between these services such that the use of these particular marks (i.e., in light of the obvious difference in two relatively weak marks), is likely to produce opportunities for purchasers or users to be misled about their source or sponsorship. See *In re Cotter and Company*, 179 USPQ 828 (TTAB 1973). See also, *General Electric Company v. Graham Magnetics Incorporated*, 197 USPQ 690 (TTAB 1977); and *Harvey Hubbell Incorporated v. Tokyo Seimitsu Co., Ltd*., 188 USPQ 517 (TTAB 1975).

Decision: The refusal to register under Section 2(d) is reversed.

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Simms, Administrative Trademark Judge, dissenting:

Upon careful consideration of this record and the arguments of the attorneys, I reach a different result on the issue of likelihood of confusion than my colleagues. As explained below, I feel constrained to reach this result because of the identification of services in the cited

registration, a description which I believe should not be restricted by evidence of the purported actual nature of registrant's use.

First, with respect to the marks--SAFETY NET and OPERATION SAFETY NET--I believe that these marks have substantially similar connotations and commercial impressions, and are similar in sound and appearance. The only difference in these marks is the addition of the word "OPERATION," a term which, in context, may be viewed as meaning a "campaign" or "project," as the majority acknowledges, and is a word with little source indication. While the word "SAFETY NET" has been disclaimed in applicant's mark, the registered mark issued on the Principal Register without a claim of acquired distinctiveness. That registration is not only over five years old, it is also incontestable. Accordingly, it is presumptively nondescriptive and distinctive. See *Park 'N Fly v. Dollar Park and Fly, Inc,* 469 U.S. 189, 224 USPQ 327, 329-30 (1985). Even if that mark is considered "suggestive," it is entitled to protection from the registration of a very similar mark for closely related services. *Hollister Inc. v. Ident A Pet Inc.,* 193 USPQ 439, 442 (TTAB 1976), and cases cited there.

With respect to the services, applicant's services are health care services provided to homeless people through drop-in care centers, shelters, mobile vans, and by foot, excluding drug replacement treatment services. In other words, applicant's services could encompass a full range of health care services except for drug replacement treatment services. Registrant's services, on the other hand, are "health care services, namely drug replacement treatment services for qualified needy patients." Although these services are not, by definition, identical or overlapping, applicant's health care services could include closely related drug prescription, drug dispensation, drug rehabilitation, treatment or medication services.

The critical issue in this case, as I see it, is the construction we are to place on the words "qualified needy patients" in registrant's identification of services. In this regard, because the word "needy" is defined in the dictionary as "being in want," "poverty-stricken," and "very poor," it is my opinion that "needy" could very well encompass homeless persons. In other words, registrant's services could include drug replacement treatment services for homeless patients as well as other needy or poor patients. In this regard, we have in the past held that an identification of goods or services is entitled to a broad

or liberal construction when considering the issue of likelihood of confusion. See *Bison Corp. v. Perfecta Chemie B.V.,* 4 USPQ2d 1718, 1722 (TTAB 1987) and *Acomb v. Polywood Plastics Corp.,* 187 USPQ 188, 190 (TTAB 1975)("Judicial interpretation, as reflected by decisions of this and other tribunals, has accorded a registration in which the goods are recited in a general rather than a specific nature a broad scope of protection sufficient to cover all types of the particular product or products enumerated therein"). Further, I believe that the majority has incorrectly relied upon extrinsic evidence (the Web site evidence) to limit the scope of registrant's services. If the respective services are in fact rendered to the same class of recipients (the homeless), then I think that confusion is all but inevitable between OPERATION SAFETY NET health care services for the homeless and SAFETY NET drug replacement services.

While it is true that both applicant's and registrant's health care services are or will be rendered by physicians and other medical professionals or trained personnel, I disagree with the majority's conclusion that the actual *purchasers* of registrant's identified services are knowledgeable and sophisticated doctors and medical professionals. Registrant's services are health care

services for qualified needy patients. Thus, the recipients of registrant's services would be the needy patients themselves, which is the relevant group which should be considered in determining likelihood of confusion, not the physicians or medical professionals who render the services. Indeed, the majority seems to concede that registrant's "consumers," in which group they would include the medically indigent (uninsured and underinsured) with limited or no financial resources, may overlap with the recipients of applicant's services. At the oral hearing, applicant's counsel also conceded that the "qualified needy patients" in registrant's services could include the homeless.[3]

However, even if one were to narrowly construe registrant's health care services to be rendered only to needy *sheltered* people rather than the homeless, it is my opinion that confusion is likely even under those circumstances. For example, a recipient of registrant's drug replacement treatment services who hears about OPERATION SAFETY NET health services for the homeless may

[3] I also disagree with the implication in the majority's opinion that applicant's services are only rendered by applicant actively seeking out the homeless, at least as applicant's services are identified in the application. Applicant renders its services, at least in part, at drop-in care centers, which the homeless would apparently visit. In any event, this is not a sufficient reason for determining that confusion is unlikely.

likely believe that those related services are sponsored by or provided by the same entity.[4] Also, because homeless people were at one time sheltered, and likely poor, it is entirely possible that a needy sheltered individual who received registrant's drug replacement treatment services, and who then became homeless and encountered applicant's health care services offered under the very similar mark OPERATION SAFETY NET, may well believe that those services were sponsored or provided by the same entity that provided him with the drug replacement treatment services. In this regard, it should be remembered that the respective services need only be related in some manner such that they could be encountered by the same people under circumstances that, because of the similarities of the marks, could give rise to the mistaken belief that the services come from the same source.

We should also not fail to realize that the "consumers" or users of these health care services are likely to be poorly educated and, to use the trademark vernacular, not very "sophisticated" persons. This factor, too, increases the likelihood of confusion in this case.

[4] For purposes of this analysis, we must assume that the marks SAFETY NET and OPERATION SAFETY NET are offered in the same geographic area. In fact, applicant apparently offers its services only in the Pittsburgh area.

Accordingly, and resolving doubt, as we must in likelihood-of-confusion cases, in favor of the prior user and registrant, it is my opinion that, construing registrant's identification broadly to include homeless persons, the same class as the recipients of applicant's services, these closely related health care services being offered to the same (or overlapping recipients) under similar marks would be likely to cause confusion. But, in any event, these closely related health care services are or will be offered to, on the one hand, very poor patients and, on the other hand, to another class of very poor people-the homeless. I believe that it is likely that these closely related health care services being offered under such similar marks will be attributed to the same source by those who encounter these marks. Accordingly, I would affirm the refusal of registration.